AUSTRALIAN CONSTRUCTORS ASSOCIATION

AUSTRALIAN INDUSTRY GROUP

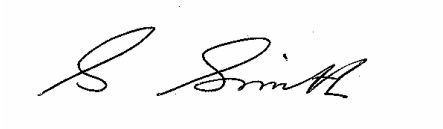
10 October 2008

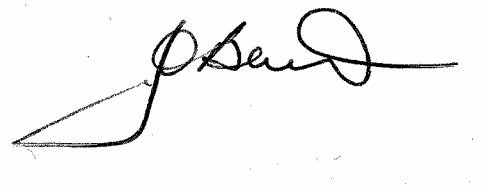
Mr John Carter
Committee Secretary
Senate Education, Employment and
Workplace Relations Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Carter,

On behalf of the Australian Industry Group and the Australian Constructors Association we make this submission to the Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2008*.

Yours faithfully,





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Inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2008

1. Introduction

Currently the building and construction industry in Australia is experiencing a period of widespread industrial harmony. The level of industrial action is at a record low and employees are benefiting from strong earnings growth.

In the current environment it is too easy to forget that only five years ago Commissioner Cole handed down his final report arising from the Royal Commission into the Building and Construction Industry identifying widespread unlawful and inappropriate industrial behaviour in the industry.

The Australian Constructors Association (ACA) and the Australian Industry Group (Ai Group) have been strong advocates for workplace relations reform in construction industry and are deeply concerned with the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* (The Bill), proposal to repeal the *Building and Construction Industry Improvement Act 2005* (BCII Act).

The reform process has not been easy on any of the parties. The new laws apply equally to employers, employees and representative bodies, and heavy penalties apply for breaches. Companies have needed to implement many changes to their systems and practices and invest heavily in training.

The reforms have been highly successful and consist of the following **five key pillars**:

1. ***The Building and Construction Industry Improvement Act (BCII Act*);**

2. ***The Australian Building and Construction Commissioner (ABCC)*;**

3. ***The Federal Safety Commissioner (FSC)*;**

4. ***The National Construction Code and Implementation Guidelines*; and**

5. ***Key elements of the WorkChoices legislation***, including the provisions which: ban industrial action in pursuit of pattern bargaining; require a secret ballot before industrial action is taken; provide immediate access to courts and the Australian Industrial Relations Commission (AIRC) when unlawful industrial action is threatened or taken; preserve freedom of association; grant appropriate rights to unions to enter workplaces; and provide a flexible workplace agreement-making system.

All of the five key pillars have combined in a mutually reinforcing manner to achieve the existing very positive environment in the industry. The removal of any of them would be very risky and damaging to the industry.

If successful, the Bill would result in

- the abolition of the Office of the Australian Building and Construction Commissioner (ABCC);
- the abolition of the Office of the Federal Safety Commissioner;
- the end of the Australian Government Building and Construction OHS Accreditation Scheme;
- the loss of many of the legislative provisions that have supported the return of the rule of law to Australian construction sites; and
- the loss of the ABCC resources devoted to monitoring compliance with the National Code of Practice for the Construction Industry and related Implementation Guidelines.

The following sections of this paper explain the five key pillars of the reforms and why it is essential for each of them to be retained.

2. The Building and Construction Industry Improvement Act 2005

The most important piece of legislation in operation to reform workplace relations in the building and construction industry is the *Building and Construction Industry Improvement Act 2005* (BCII Act). The provisions which deal with unlawful industrial action have been operative since March 2005. The remaining provisions of the Act have operated since September 2005.

The structure and content of the BCII Act is summarised below:

- ***Chapter 1 – Preliminary*** - defines the coverage of the Act and sets out a series of key definitions;

- ***Chapter 2 – Australian Building and Construction Commissioner (ABCC)*** – establishes the office of the ABCC and sets out its functions and structure;

- ***Chapter 3 – The Building Code*** – empowers the Minister for Employment and Workplace Relations to issue a code of practice to apply to building contractors and other building industry participants;

- ***Chapter 4 – Occupational Health and Safety*** – establishes the office of the Federal Safety Commissioner (FSC) and prescribes its functions and

structure. This chapter also provides for the establishment of an occupational health and safety accreditation scheme for persons who wish to enter into building contracts with the Commonwealth and its authorities.

- ***Chapter 5 – Industrial Action*** – defines "unlawful industrial action" and empowers Courts to issue injunctions where such action is occurring, threatened, impeding or probable;

- ***Chapter 6 – Discrimination, Coercion and Unfair Contracts*** – deals with coercion in relation to the engagement of employees and contractors, coercion in relation to certified agreements and superannuation, discrimination in relation to industrial instruments, and unfair contracts;

- ***Chapter 7 – Enforcement*** - deals with penalties for contravention of the Act. This chapter also sets out the ABCC's powers to obtain information, the powers of ABC Inspectors, and the powers of Federal Safety Officers;

- ***Chapter 8 – Miscellaneous*** – includes a range of provisions pertaining to project agreements, the ABCC's powers of intervention, the jurisdiction of various Courts, and numerous other matters.

The roles of the ABCC, the FSC and the National Code of Practice for the Construction Industry are covered in later sections of this paper.

Unlawful Industrial Action

Industrial disputes in the building and construction industry can be extremely costly. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous hidden costs that arise due to delays in completion resulting from industrial action. These costs include:

- Liquidated damages – up to $50,000 per day is typical;
- Damage to the contractor's reputation which may result in the loss of future business;
- Program acceleration expenses, eg. extra overtime;
- Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and
- The effects of inflated sub-contractor tender prices, which tend to occur on trouble-prone projects.

One area of great concern to contractors is the additional stresses that arise due to accelerated *"catch-up"* programs, which need to be implemented when delays have been caused by industrial disputes. Such programs can have a negative effect on safety performance and quality and result in significant overtime penalty costs.

In addition, industrial action taken in the building and construction industry typically creates significant hardship for third parties (both employers and employees) due the inter-related nature of the activities carried out by sub-contractors.

The BCII Act creates additional protection against unlawful industrial action which is only applicable to the building and construction industry. This additional protection is necessary given the unique nature of the building and construction industry and also because of the widespread unlawful industrial behaviour which was occurring in the industry up to 2005 when the Act came into operation. The unions and most of the union officials which were organising such unlawful action are still operating and it is highly probable that they would return to their past ways if the laws were relaxed.

- ***Definition of industrial action / outlawing the use of OHS as an industrial weapon***

Like the definition of "industrial action" in the *Workplace Relations Act* (WR Act), the definition of "building industrial action" in the BCII Act excludes industrial action based on a reasonable concern by an employee about a risk to health or safety, where there is no other substituted work available to be done. However, Section 36(2) of the BCII Act places the onus of proving that there was an imminent risk to the safety of employees justifying stoppage of work, on the person alleging this. This was a direct response to findings of the Cole Royal Commission that occupational health and safety was regularly being exploited in the industry to further industrial objectives.

Prior to the enactment of the BCII Act, OHS was often misused by unions as an industrial weapon against employers. It is essential that strong laws remain in place to prevent this highly inappropriate and damaging tactic. Bogus safety disputes have cost the industry dearly over the years and were one of the most significant industrial relations problems in the industry. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS in the industry.

The BCII Act outlaws the misuse of OHS, but the rights of employees to refuse to perform duties which are genuinely unsafe are protected.

- ***A penalty for taking unlawful industrial action / immediate access to Courts to pursue damages***

The WR Act does not create an offence of taking unlawful industrial action in general terms, but allows orders to be obtained under s.496, which can lead to penalties and injunctions if breached. Also, the WR Act makes it an offence to take industrial action prior to the nominal expiry date of a workplace agreement.

In contrast, the BCII Act takes a more direct approach, as recommended by the Cole Royal Commission. Section 38 simply stipulates that a person must not engage in unlawful industrial action and provides for a maximum penalty of $110,000 for breaches.

In addition to the penalties for unlawful industrial action, a relevant court can award compensation to a person who has suffered damage as a result of the unlawful industrial action and may make other appropriate orders (section 49 of the BCII Act). This is a very significant provision that enables parties suffering financial damage from unlawful industrial action to seek redress from the instigators.

These provisions have proved to be a very effective deterrent against unlawful behaviour and it is vital that they be retained.

Coercion – nominated labour

One of the most significant contributing factors to poor workplace relations in the construction industry over the years has been the coercion of employers to employ specific people nominated by unions. Prior to the reforms, unions regularly refused to sign an industrial agreement with the head contractor or major subcontractors on a project, and refused to allow work to commence, until agreement has been reached on the hiring of people nominated by the unions and assignment of key roles, such as that of OHS representatives, to these people. Many of the individuals nominated were highly militant and had a history of contributing to poor workplace relations on previous construction projects.

It is essential that employers have the ability to employ the best candidates for each job. Employers carry the risk for OHS on a project and must be able to employ the staff who are best qualified to enable the company to achieve a high level of OHS performance – not the people forced upon them by unions for industrial purposes.

The anti-coercion provisions of the BCII Act adopt proposals which the ACA and Ai Group argued strongly for in submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.

Section 43 of the BCII Act makes it an offence to take action, or threaten to take action, with intent to coerce some other party:

- To employ, or not employ, an employee;
- To engage, or not engage, a contractor;
- To allocate or not allocate particular duties or responsibilities to an employee or contractor.

The provisions apply equally to unions and employers. A principal contractor would commit an offence if it threatened to withhold work from a contractor unless it used a particular sub-contractor. Any argument by a contractor that it had been forced by a union to commit the offence, would not be a defence.

Coercion and discrimination – agreement making

Section 44 of the BCII Act operates in lieu of section 400 of the WR Act for building workplace agreements. Section 44 deals with attempts to force parties to make a workplace agreement (other than through protected action) and with attempts to prevent employees appointing a bargaining agent in negotiating an agreement with their employer. The penalties for breaching section 44 are more than three times higher than under the WR Act.

Section 45 of the BCII Act prohibits discrimination by a party against an employer due to the type of industrial instrument used by the employer. Consistent with the recommendations of the Royal Commission, section 45 ensures that every employer on a site has the right to determine the conditions of employment with its own employees rather than being forced by a union or a head contractor to adopt a particular type of agreement.

There is an exemption from this offence in the case of a party encouraging an employer to have "eligible conditions" in their agreement. "Eligible conditions" are defined to mean:

- The times or days when work is to be performed;
- Inclement weather procedures; or
- Provisions which comply with the National Code of Practice for the Construction Industry and Implementation Guidelines.

This exclusion represents the BCII Act's sole concession regarding site agreements. The legislation accepts that head contractors may insist on sub-contractors having certain provisions in their agreements in the three areas listed (to enable the project to be efficiently managed), but not in other areas.

There is an important distinction between site employment conditions and general site conditions. Head contractors have broad rights to determine general site conditions relating to a wide range of matters such as safety, hours, access, plant use, security, hygiene, pollution and noise suppression. None of these general site conditions can deal with employment conditions for employees of subcontractors. For example, a head contractor can specify that no work is to be performed on weekends without special consent, but if such limitation specified that workers must be paid triple time for such work, it would offend the BCII Act.

Section 64 of the BCII Act is a related provision to section 44. Section 64 provides that agreements entered into with the intention of securing standard employment conditions on a particular site are not enforceable unless formally lodged and approved by the Workplace Authority.

Registered organisations are responsible for the conduct of officers, employees, delegates and members

When unlawful action is taken, unions often seek to distance themselves from the actions of their officials, delegates and members.

Section 69 is a vital provision which makes registered organisations presumptively responsible for the actions of officials, employees and members. An exemption exists regarding the actions of delegates and members, where the organisation has taken "reasonable steps to prevent the action".

3. The Australian Building and Construction Commissioner (ABCC)

The Cole Royal Commission recommended that an Australian Building and Construction Commission be established with powers to monitor conduct in the industry and prosecute unlawful acts and breaches of relevant laws. It was recommended that the ABCC be a 'one stop shop' for all complaints of unlawfulness in the industry. This series of recommendations was implemented via the BCII Act.

Under section 10 of the BCII Act, the functions of the ABCC are:

- Monitoring and promoting appropriate standards of conduct by building industry participants, including by:
    - Monitoring and promoting compliance with the BCII Act, the Independent Contractors Act and the WR Act;
    - Monitoring and promoting compliance with the Building Code; and
    - Referring matters to other relevant agencies and bodies;
- Investigating suspected contraventions, by building industry participants, of the BCII Act, the WR Act, the *Independent Contractors Act*, industrial instruments, orders of the AIRC; and the Building Code;
- Instituting or intervening in, proceedings in accordance with the BCII Act;
- Providing assistance and advice to building industry participants regarding their rights under the BCII Act, the WR Act and the *Independent Contractors Act*;

- Providing representation to a building industry participant who is, or might become, a party to proceedings under the BCII Act, the WR Act or the *Independent Contractors Act*, if the ABCC considers that providing the representation would promote the enforcement of these Acts;

- Disseminating information about the BCII Act, the WR Act, the *Independent Contractors Act*, the Building Code and other relevant matters including disseminating information through facilitating discussions with building industry participants; and

- Other functions as conferred by legislation or regulation.

Information Gathering Powers of the ABCC

Much has been made of the ABCC's powers to obtain information which are detailed in s.52 of the BCII Act.

If the ABCC believes on reasonable grounds that a person has information, or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation, the ABCC may, by giving written notice, require the person to:

- Give the information within a specific time and in the manner and form specified in the notice;
- Produce the documents by the time and in the manner specified in the notice; or
- Attend to be interviewed (with legal representation if the person wishes) at the time and place specified in the notice.

A person commits an offence if he/she fails to give the required information in the time and manner specified, attend and answer questions at the time and place specified, take an oath or affirmation when required to do so, or answer questions relevant to the investigation while attending as required by the notice. A penalty of imprisonment for six months can apply if the person fails to comply with these requirements (s.52 of the BCII Act). No person has ever been penalised under this provision.

The ABCC regularly publishes reports on the use of its compliance powers. In its most recent report, for the period 1 October 2005 to 31 March 2008, the Office of the ABCC reports:

- 96 s52 Notices issued to attend and answer questions and 85 examinations conducted;
- Four s52 Notices requiring production of documents with documents produced in response to three of these Notices.

There has been much misinformation circulated concerning a witness' rights to choose his/her own legal representative following the Federal Court's *Bonan v Hadgkiss* decision. In that case the Deputy ABCC excluded a legal representative because that representative had already acted for a different witness in another examination related to the same investigation. The Federal Court upheld the Deputy ABCC's decision.

The industry recognises the need for these powers and believes they have been exercised appropriately, sparingly and with discretion.

For much of its life, the predecessor to the ABCC – the Building Industry Taskforce – did not have the power to require persons to provide information or require them to attend to be interviewed. During this period union officials routinely refused to provide information or answer questions, and they advised their members to do likewise. It is reported that 52% of Taskforce investigations had to be closed due to a lack of cooperation. As soon as the powers were given to the Taskforce it became a far more effective body.

Prior to the enactment of the BCII Act and the establishment of the ABCC, a culture of intimidation in the industry made it very difficult for investigators to gain the cooperation of those affected and the rule of law was severely diminished.

The ABCC has been a very important agency in achieving industrial peace and lawful behaviour in the construction industry. Whilst it is important to have strong laws and strong penalties to deal with unlawful behaviour, it is essential that a well-resourced agency is active in investigating alleged unlawful behaviour and pursuing the prosecution of offenders.

The vast majority of those working in the construction industry believe that the powers of the ABCC are appropriate and have been exercised with discretion.

4. The Federal Safety Commissioner

The establishment of a pre-tender occupational health and safety (OHS) qualification scheme and the creation of the Office of the Commissioner for Health and Safety were both recommendations of the Royal Commission into the Building and Construction Industry.

Section 29 of the BCII Act empowers the Secretary of the Department of Employment and Workplace Relations (DEWR) to establish a new position within the Department, of Federal Safety Commissioner (FSC).

The FSC has a number of functions. These are to:

- Promote OHS in relation to building work;
- Monitor and promote compliance with the OHS elements of the Building Code;
- Disseminate information about the Building Code, so far as the Code deals with OHS,
- Perform functions as the accrediting authority for the accreditation scheme;
- Promote the benefits of the accreditation scheme and disseminate information about the accreditation scheme;
- Refer matters to other relevant agencies and bodies; and
- Perform any other functions conferred on the FSC by the Act or Regulations.

The main focus of the FSC has been Building and Construction OHS Accreditation Scheme which has been operating since 1 March 2006. It operates such that Australian Government departments and agencies can only enter into building contracts with companies that have achieved accreditation under the Scheme.

The FSC established a provisional Accreditation Scheme which accredited 58 contractors. The full Accreditation Scheme took effect from 1 October 2006. To date 103 companies have achieved full accreditation. Full accreditation can be granted for up to three years to contractors who successfully meet the full scheme requirements.

The scope of the Scheme has since been extended. Under Stage 2 of the Scheme, which came into operation in October 2007, the threshold for those contracts directly funded by the Australian Government was lowered from $6 million to $3 million. In addition, the Scheme has been extended to cover head contractors on building and construction projects indirectly funded by the Australian Government where the value of the Australian Government contribution is at least $5 million and represents at least 50% of the total construction project value, or where the Australian Government contribution is $10 million or more irrespective of the proportion of funding.

The Office of the FSC and the Accreditation Scheme have been very positive influences on the industry's OHS performance and the ACA and Ai Group strongly support their retention.

5. National Code of Practice for the Construction Industry and Implementation Guidelines

Background to the development of the Code and Guidelines

The final report of the Royal Commission into the Building and Construction Industry called for the strengthening and extension of the National Code of

Practice for the Construction Industry (the Code) and Commonwealth Implementation Guidelines (the Guidelines) and greater rigour in the Commonwealth's implementation of these instruments.

The report also stated that the Commonwealth had put its interests as a purchaser of construction above those of the economy and that the Commonwealth should be prepared to accept some short term commercial pain as a client for the longer term benefits that would flow if it used its purchasing power to drive real change on its own projects.

The Royal Commission recommended that the National Code and Implementation Guidelines should apply to all projects to which the Commonwealth directly or indirectly provides funds and that the Commonwealth should only agree to do business with those who comply with the National Code and Implementation Guidelines on both publicly and privately funded projects.

The first Code of Practice in Australia, the NSW Government's Code of Practice for the Construction Industry (October 1992), was very much a by-product of the Royal Commission into Productivity in the Building Industry in New South Wales (Gyles Royal Commission). Its purpose was to ensure that the construction industry operated within the law and to utilise the government's substantial purchasing power to stimulate reform within the industry[1]. Since this time, separate Codes have been released for all States and Territories (with the exception of the ACT, where the National Code applies).[2]

The National Code of Practice for the Construction Industry was jointly developed by the Commonwealth, States and Territories. It was introduced in 1997. The Commonwealth issued implementation guidelines in 1998 to accompany the Code[3]. Essentially the National Code set down the standards that the Government, as a client of the industry, expected of its service providers. Its impact on private sector construction was benign. The expectation was that by attempting to lift performance standards in one market, it would make a positive contribution to improving standards in non-government sections of the market.

The Australian Government Implementation Guidelines for the Construction Industry were revised and re-released in December 2003 and came into effect from 1 January 2004 incorporating various recommendations of the Cole Royal Commission. A second revision was released in September 2005 and the current Guidelines were released in June 2006. These are the Guidelines by which the Commonwealth now operates.

The Code and Guidelines now cover all construction projects that have Australian Government funding (in the case of indirectly funded projects certain

[1] Royal Commission Discussion Paper 8, Note 8, p.9.
[2] Royal Commission Discussion Paper 8, Note 8, pp.10, 11.
[3] Royal Commission Discussion Paper 8, Note 8, p.10.

financial thresholds apply). Contractors to the Commonwealth are also required to make commercial undertakings to apply the Code and Guidelines on their privately funded projects and through back-to-back contract conditions to subcontractors and suppliers.

The effect of the Code and Guidelines on the tender process

When a Government department or agency advertises for tenderers a statement that the Code and Guidelines will apply to the project is included.

Model clauses for both directly and indirectly funded projects accompany the Code and Guidelines. For directly funded projects these include: a Checklist for use when seeking Registrations of Interest, Model Tender Clauses, an Undertaking of Compliance Schedule and Model Contract Clauses. Documentation for projects indirectly funded by the Australian Government include: Model Deed of Agreement Clauses, Model Tender Clauses, an Undertaking of Compliance and Model Contract Clauses.

When submitting its tender documentation the contractor is required to include details of the industrial instruments (agreements and awards) that will apply together with a checklist for Code and Guidelines compliance. Also, the contractor is required to disclose if it is the subject of any sanctions that have been applied under the Code and Guidelines.

The client department or agency then assesses the tenderer's industrial instruments for compliance with the Code and Guidelines. This check may be performed by the Department of Education, Employment and Workplace Relations (DEEWR's) Code Implementation team on behalf of the client. Client agencies are only allowed to award contracts to compliant tenderers.

The head contractor has a range of responsibilities regarding its own compliance under the Code and Guidelines and also by its subcontractors. The head contractor must:

- Ensure that project managers, contractors, subcontractors, consultants and all employees undertaking work on the project comply with the Code and Guidelines;
- Require compliance with the Code and Guidelines from all subcontractors and material suppliers before doing business with them;
- Ensure contractual documents allow for the ABCC to access sites, documents and personnel to monitor Code compliance;
- Ensure appropriate processes are in place to ensure compliance with freedom of association and right of entry laws;
- Ensure there is an OHS plan for the project (although this obligation is now regulated by the Accreditation Scheme);

- Where threatened or actual industrial action occurs on a project, it is reported to the client agency;
- Where practicable, ensure remedial action to rectify non-compliant behaviour is undertaken by contractors and subcontractors, when it is drawn to their attention;
- Ensure the Code Monitoring Group within DEWR is notified of alleged breaches within 21 days;
- Ensure Code Monitoring Group sanctions are enforced.

The ABCC has been assigned the role of auditing for Code compliance. Once a project commences the ABCC may review on-site practices and investigate breaches reported to the client agency or to the Code Monitoring Group.

6. Key elements of the WorkChoices legislation

The original BCII Bill dealt with a much wider range of matters than were ultimately included in the BCII Act. After the BCII Bill was introduced into Parliament in 2003 the Coalition gained control in the Senate and decided to deal with many of the recommendations of the Cole Royal Commission in the WorkChoices legislation rather than in the BCII Act. These included:

- Forms of agreement
- Maximum term of agreements
- Prohibited Content
- Industrial action taken in pursuit of pattern bargaining
- Suspension and termination of bargaining periods
- Freedom of association
- Right of entry

These changes were consistent with recommendations of the Royal Commission and form an important part of the construction industry reforms.

Conclusion

Each of the five key pillars of the construction industry reforms are extremely important. They have combined in a mutually reinforcing manner to achieve the existing very positive environment in the industry. The removal of any of them would be very risky and damaging to the industry.

The reforms have supported a generational change in the culture of the construction industry. The industry has never been a better place in which to work and invest as is evident in the record low level of industrial disputation, high wages growth and higher productivity. Winding back the reforms would be an extremely retrograde step that would be very strongly resisted by the industry.